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Judges are not given the task of running the Army.
Justice Jackson[1]

From time to time, civilian courts deal with the problem of whether—and how—to review military administrative determinations. The extreme traditional position, still taken by many courts, is that such decisions are simply not reviewable. *Orloff v. Willoughby*,[2] a Korean-war era Supreme Court decision, is probably the most frequently cited authority for this position. But several recent decisions[3] have suggested that review is proper, and in fact required, where important personal rights are at stake. No systematic theory exists to guide courts through the whether's and how's of this very delicate subject, and the relevant decisions are in disarray.

There are two distinct approaches. One, exemplified in the cases following *Orloff*,[4] regards the military as so fundamentally different from civilian agencies that unique principles govern judicial review of all

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1. Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

2. *Id.* Orloff had been drafted under a special statute, for service as a doctor during the Korean conflict. After he refused as a matter of conscience to answer questions about membership in organizations on the "Attorney General's List" he was denied a commission. The Army then refused to assign him duties as a physician because he had no commission. *Id.* at 84-86. The Supreme Court, speaking through Justice Jackson, denied relief, holding in an opinion characterized by lack of citations to authority that Orloff had no right to the commission as such, *id.* at 90-91, and that review of assignment decisions, once subjection to military control was found proper, was beyond the scope of habeas corpus. *Id.* at 92. There were vigorous dissents by Justices Black, *id.* at 95, and Frankfurter, *id.* at 97, who joined each other and were also joined by Justice Douglas. It is interesting to ponder the degree to which the majority position may have been affected by the political climate of the times.

3. See note 90 *infra* and text accompanying. *See also* O'Callahan v. Parker, 395 U.S. 258 (1969).

4. See note 90 *infra* (cases refusing to find jurisdiction). These cases do not, strictly speaking, follow *Orloff*, since they deal with other bases of jurisdiction; but the viewpoint of the court in each is guided by the general viewpoint of the majority in *Orloff*.

military acts. The other, regarding the armed services as governmental agencies *simpliciter*, presumes their acts to be reviewable on the same basis as actions of civilian agencies—with the awareness that certain governmental interests exist in the field of arms that are unique to it, and therefore must be accounted for in the review process.

Even those courts disposed actively to review have accorded special deference to military determinations where the service seems to have expertise or experience not shared by the court, or where certain matters appear to have been left by Congress to the discretion of military decision-makers.[5] The fact that military justice is an Article I rather than an Article III power under the constitution,[6] though not directly relevant in the field of administrative law, has no doubt also contributed to judicial reluctance to intervene in administrative decisions. One might also anticipate judicial apprehension that if civilian courts interfere too much with a powerful military, it may choose to return the favor. The reasons for caution, especially deference to military expertise and experience, are compelling.[7]

Also compelling, however, are claims for protection of private rights. It is the function of courts to safeguard those interests by providing a check on the other branches of government in their relations with citizens;[8] such rights are meaningless unless they are enforced. The court's problem is to take into account factors peculiar to the military, including unique interests and experience, in deciding proper boundaries for their own intervention.

This article examines recent decisions and current issues in an attempt to bridge the gap between the two judicial attitudes. It emphasizes familiar legal principles which can contribute to more objective decision-making in this often emotion-charged field. The case of Leonard Matlovich,[9] an Air Force technical sergeant recently dis-

5. *See, e.g.*, Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971). See note 19 *infra*, and *see* Note, *Constitutional Law—Judicial Review—Civilian Interference with Military Administrative Decisions*, 47 TULANE L.R. 418 (1973) [hereinafter cited as *Interference*], and cases cited therein.

6. U.S. CONST. art. I, § 8, cl. 14.

7. Concerning judicial reluctance to intervene and some of the reasons behind it, *see* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 186-87 (1962).

8. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 28.07 (3d ed. 1972) [hereinafter cited as DAVIS].

9. Matlovich's discharge was recommended by a board which met at Langley AFB, Virginia, and rendered its decision on September 19, 1975. He was discharged in late October, 1975, after the United States District Court for the District of Columbia declined to restrain the service's execution of the discharge. The matter is presently in preliminary motion stages. *See* Matlovich v. Secretary of the Air Force, Civil No. 75-1750 (D.C.D.C. Oct 28, 1975); N.Y. Times, 20 Sept. 1975, § 1 at 1, col. 2; *id.* at 15, col. 3; N.Y. Times, 22 Oct. 1975, § 1 at 62, col. 1.

charged for homosexuality, is referred to from time to time to place the issues in focus; other possible problems are also sketched briefly to help clarify the analysis.

I. Points of Departure

It seems settled—if only recently—that the constitution protects members of the military as well as civilians.[10] On the other hand, it also is clear that in certain cases peculiar necessities of military life may constitutionally override individual interests.[11] Whatever the eventual balance of interests, the Constitution together with the guarantee of human rights it embodies extends to individuals within the military services, and where this fundamental law reaches, the courts have a corresponding duty to make it effective. It follows that the courts bearing this burden must look to the merits of controversies according to some logical process, defining in each factual situation presented to them the peculiarly military necessities that may be present and weighing these against the individual rights at stake. Just how the courts should discharge this constitutional duty has been addressed in recent appellate opinions.

A. Representative Cases

In *Yahr v. Resor*,[12] a 1970 case, the Fourth Circuit instructed a lower court to examine the merits of two soldiers' claims against a post commander who had refused to let them distribute an antiwar newspaper on post. The men claimed deprivation of their First Amendment right to publish political commentary. The circuit court panel assumed that the Constitution applies within the military services, and suggested

10. *See* Burns v. Wilson, 346 U.S. 137 (1953); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960) (the definitive statement by the highest military appeals court). *But see* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 56-57 (1970), on the problem of defining the way in which the Constitution applies. And note also the possible restrictive effect that Parker v. Levy, 417 U.S. 733 (1974), may have on constitutional rights vis-a-vis the military services. *Cf.* Justice Douglas' dissent in *Levy*. 417 U.S. 737, 766-67 (1974). The majority opinion appears to resurrect the judicial deference to assertions of military necessity that had been downplayed if not abandoned in O'Callahan v. Parker, 395 U.S. 258 (1969). In *O'Callahan* the Court had held that for an off-post crime to be cognizable in a court-martial it must affect military status or discipline (be "military-related"). The significance of the opinion in the present context is that the Court's refusal there to accept mere assertions of relatedness without proof suggests that it is proper for courts to inquire into military determinations to see if they are sound in logic and have factual support.

11. The clearest examples are in the speech cases. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974), and cases cited therein.

12. 431 F.2d 690 (4th Cir. 1970).

standards for deciding how constitutional rights might be legitimately limited, while refusing to interfere immediately with the commander's action. The court's position rested on the ground that "servicemen are entitled to the protections of the Bill of Rights, except where military exigencies, such as security and discipline, by necessary implication restrict their applicability."[13]

Finding that the judge below had not abused his discretion by refusing the immediate relief sought, the court nonetheless remanded for a full consideration of the merits of the claim, outlining what the judge below should ask in deciding the issue:

> [P]arties should brief, and the district judge should decide, the appropriate standard of review of the Commanding General's decision. The district court should also find which articles, specifically, constituted a basis for the decision to exclude and why the Commanding General deemed them "a clear danger to the loyalty, discipline and morale" of the military personnel at Fort Bragg. Only upon a complete record supplying these facts can it be determined whether the Commanding General had a proper basis for denying the applications. . . .[14]

Unfortunately, the district court decided that the appropriate standard for review was no review at all, responding to the first part of the quoted directions and wholly ignoring the balance. The lower court dismissed after concluding that it had no jurisdiction to review a commander's action under any of the available federal statutes, despite the circuit court's clear implication to the contrary.[15] The lower court's decision was apparently never appealed.

However unhelpful the ultimate result in *Yahr*, the circuit court opinion still offers an approach to review that accounts for both the duty of the district court to safeguard individual rights, and its concurrent duty to respect the military decision-maker's sphere. The circuit court opinion would require that the commander first identify the objectionable material, and then state why it is objectionable. The court would then assess that determination on some scale of reasonableness.[16] Thus *Yahr* suggests that, given a prima facie showing of deprivation of at least this kind of constitutional right,[17] there is a burden on the service to state its grounds and reasons, which the court will then subject to an

13. *Id.* at 691, *citing* Jacoby, 11 U.S.C.M.A. at 430-31, 29 C.M.R. at 246-47 (1960).

14. 431 F.2d at 691.

15. Yahr v. Resor, 339 F. Supp. 964, 969 (E.D.N.C. 1972).

16. The particular test to apply was implicitly left to the parties and the court below. 431 F.2d at 691.

17. The constitutional right at issue was First Amendment political publication, generally recognized as enjoying exceptional protection. The same activist position might not have been taken by the circuit court if some less weighty right had been at stake.

as yet undefined test of propriety. This might be a minimal burden depending on how carefully the court examines the service's reasoning,[18] but it is not the complete abdication of review indulged in by the district court.

A year after the circuit court decision in *Yahr*, in *Cortright v. Resor*,[19] the Second Circuit considered similar questions. Plaintiffs in the case argued that they had been transferred as punishment for their political activities, and asked the court to rescind the transfers. The court examined in detail the decision-making conduct of the two commanders involved, and concluded that their actions in transferring the plaintiffs were justified. The court held, reversing the district court, that relief was not appropriate on the facts but continued: "We do not say that a case could never arise where a transfer order could be invalidated by a civilian court on such a basis."[20]

Seemingly both a more severe deprivation of individual rights and less careful action by a commander would have been required to justify relief. But the opinion's lesson lies in the judges' extended examination of the actions, in this sacrosanct discretionary domain, of the two commanders involved.[21] This scrutiny constituted genuine judicial review

18. See notes 47-50 *infra* and text accompanying. The possibilities range from a perfunctory minimum rationality approach, through some sophisticated tests, to the stringent compelling state interest test applied in certain circumstances in equal protection analysis.

19. 447 F.2d 245 (2d Cir. 1971). Cortright, a member of an Army band unit, had been transferred from New York to Texas in response to his antiwar activism. He and others had circulated a petition among unit members condemning the Vietnam war, and published it in the New York Times. Later there was internal dissension caused at least in part by their activities, and in one instance the wives and fiancees of several men marched alongside the band at a parade carrying antiwar banners. The immediate commander recommended, and his superiors carried out, a transfer of Cortright and others as part of an already-planned reduction in the unit's size, but concededly in an effort to alleviate the disruption caused by their activities.

20. *Id.* at 246.

21. *Id.* at 254-55. Another article, reviewing *Cortright*, criticizes the Second Circuit for disregarding the district court's factual findings, agreeing with the dissenting judge that the lower court's findings were binding. *See Interference, supra* note 5. But the earlier opinion appears to rest on the finding that the transfers were ordered to stifle antiwar activities. Cortright v. Resor, 325 F. Supp. 797, 824 (E.D.N.Y. 1971). That finding was held to be clearly erroneous in the Second Circuit opinion. 447 F.2d at 252, n.7. The appeals court concluded that the transfers were ordered in response to activities of wives and fiancees incited by the petitioners, 447 F.2d at 252-53, again contradicting the lower court. *See* 325 F. Supp. at 823.

As Judge Oakes' dissent points out, appellate courts will not normally disturb the factual findings below if reasonable persons could have drawn the same inferences. 447 F.2d at 255, 257. But the case before him was not an ordinary one. The lower court had before it an Article 138 proceeding (complaint against the commander—*see* 325 F. Supp. at 818.) where it had been concluded after full investigation of the circumstances that the commanders' actions did not violate the petitioners' rights. The court found

of the decision-making process. Unfortunately, apart from bowing formally to *Orloff* and noting a more modern recognition of the limits on civilian courts' power to review military decisions,[22] Judge Friendly did not fully state his guiding standards in the *Cortright* decision.

In the same year, the Fifth Circuit took a more ambitious approach in *Mindes v. Seaman*,[23] following its own earlier opinion in *United States v. Flower*,[24] where it had held that courts may decide whether military administrative decisions are arbitrary or capricious. In *Mindes* Judge Clark essayed a set of principles systematically approaching the question of whether or not a court should review a particular military decision, and outlining factors a judge should weigh in coming to a decision.[25] Those principles are not altogether satisfactory. Nonetheless, they are the fullest judicial statement to date, and can serve as a starting point for construction of a more satisfactory set of principles.

B. The Approach in Mindes v. Seaman

Captain Milbert Mindes had sought for some time to void what he asserted was a factually erroneous Officer Effectiveness Report, on the basis of which he had been denied promotion and had been forced from active duty.[26] After exhausting administrative remedies, he brought

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the Article 138 investigating officer's conclusion to be arbitrary and capricious and thus held that it was not bound by it. But the lower court's finding on this matter amounts to a conclusion of law, resting as it does on the court's assessment of the record before it. The same is true of the "conclusion on facts and law" that comes at the end of the lower court's opinion. *See* 325 F. Supp. at 818, 827. Conclusions of law are open to reexamination by reviewing courts, and it was not improper therefore for the Second Circuit to in effect reinstate the findings of the Article 138 investigation.

Even if the circuit court's action were reversed, the impact would be to broaden rather than restrict the scope of judicial inquiry into military determinations. The court below was not hesitant to examine the facts and circumstances and substitute its judgment for that of the military commander, even going so far as to order the petitioner's transfer back to New York. *Id.* at 828.

22. Sanders v. Westmoreland, 2 S.S.L.R. 3157 (D.D.C. 1969), *cited in* 447 F.2d at 246.

23. 453 F.2d 197 (5th Cir. 1971), reversing and remanding for consideration of the merits. Relief was denied by the district court in an unpublished opinion, and the Fifth Circuit affirmed on the merits. 501 F.2d 175 (1974).

24. 452 F.2d 80 (5th Cir. 1971), *reversed*, 407 U.S. 197 (1972). The reversal does not weaken the part of the opinion relied on in *Mindes* because the Court reversed on a factual distinction. Flower was an organizer for the American Friends Service Committee and was charged with reentering an installation after receiving an expulsion order. The circuit court had upheld the commander's expulsion action, stating in dictum that it could ask if the commander had acted "arbitrarily or capriciously, without proper justification . . . ." 452 F.2d at 86. The fact that First Amendment rights were at stake renders the chosen standard suspect, but as a statement of the minimum a court can require it seems correct.

25. 453 F.2d at 201-02.

26. *See* AIR FORCE MANUAL [hereinafter AFM] 36-12, § E, paras. 29 and 30, June

suit in federal court seeking declaratory and injunctive relief.[27] The district court denied a temporary restraining order, and dismissed with prejudice for want of jurisdiction. The Fifth Circuit vacated and remanded, holding that the question was not one of jurisdiction.

In his opinion for the court, Judge Clark pointed out that though some jurisdictional questions are involved, what is at stake is a "policy akin to comity,"[28] which involves judicial discretion. It follows that a judge must go beneath the surface and examine the merits at least to the limited extent necessary to the proper exercise of discretion. The opinion then set forth an outline to guide lower courts in their deliberations.

First, the plaintiff must allege: deprivation of some constitutional right; military action in excess of congressionally granted authority; or action in violation of the service's own directives.[29] In short, some legally cognizable damage must appear or the court cannot act.

Second, the court must also inquire whether the plaintiff has exhausted administrative remedies.[30] It may not proceed if an available procedure promises consideration of plaintiff's claim. Of course, the review offered must in fact be meaningful and not simply another hurdle to be crossed before plaintiff finally gets into court.[31]

The Leonard Matlovich discharge case illustrates these principles. Having announced his homosexual orientation to his commander, Matlovich was discharged on the recommendation of a board of officers.[32] Under normal circumstances, he would be required to take appeals through service channels and then to the Board for Correction of Military Records (BCMR).[33] However, a federal court has accepted the case and ordered argument, reasoning that BCMR review would be futile.[34] This conclusion is undoubtedly correct, as was the court's

28, 1973, establishing the standards and requirements involved. A recent Supreme Court case, Schlesinger v. Ballard, 419 U.S. 498 (1975), dealt with and found valid a similar "up-or-out" provision.

27. 453 F.2d at 198.

28. *Id.* at 199. The word comity was used to distinguish the flexibility of this policy from the relative rigidity of standards like those governing jurisdiction.

29. *Id.* at 201.

30. *Id.*

31. *See* Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 48 MIL. L. REV. 91, 110 (1970).

32. N.Y. Times, Sept. 20, 1975, § 1, at 1, col. 2; N.Y. Times, Oct. 22, 1975, § 1, at 62, col. 1.

33. 10 U.S.C. §§ 1553 & 1554 establish service review boards for examination of discharges. 10 U.S.C. § 1552 establishes a separate Board for Correction of Military Records under each service secretary, at an echelon above the review boards.

34. Matlovich v. Secretary of the Air Force, Civil No. 75-1750 (D.C.D.C. Oct. 28, 1975).

decision not to grant any order restraining the service from executing Matlovich's discharge during the pendency of the litigation.[35]

Matlovich's interests are threatened in several important ways. He stands to lose income, both present and future, if the discharge action is upheld; he will also lose any chance for retirement at the end of a career to which he seems to have been committed. Apart from these financial considerations, which implicate the due process clause, there are two fundamental interests at stake: the right of privacy and the right of association—in effect Matlovich's right to choose his own style of life in an extremely personal matter.

The prerequisites of cognizable deprivation and exhaustion of remedies are met, and so the court has before it a matter it *can* review. It must then, according to Judge Clark in *Mindes*, balance four additional factors in deciding whether or not it *will* review. Those factors together comprise the "policy akin to comity" with which the court is concerned. They are:

a) The *nature and strength* of plaintiff's challenge;

b) The *potential injury* to plaintiff if no relief is granted;

c) The *type and degree of expected interference* with the military (it must "seriously" impede "vital" duties to militate against review);

d) The extent to which *military expertise* and *discretion* are involved.[36]

Judge Clark gave no indication of how the four factors listed ought to be balanced, leaving this question to the judgment of the trial court in particular cases. He did not consider whether a plaintiff might, by some adequate showing, shift the burden of proof to a defendant military service. Nor did he suggest the kind of proof that might be required of any party. These matters were explicitly left to the trial court.[37] Moreover, his fourth element threatens to engulf and render surplusage the entire analytical structure, positing as it does an undefined discretion or expertise to which the court might bow without further explanation. The balancing of Judge Clark's four listed factors thus needs fuller analysis.

C. A Little Help From Administrative Law

If there is merit in the notion that military decisions are presumptively reviewable on the same basis as those civilian agencies,[38] then the

35. *See id.* Refusal to grant the restraining order is in accord with basic equity principles. The discharge order is fully reversible by the court after full consideration of the merits.

36. 453 F.2d at 201-02.

37. *Id.* at 202.

38. See text accompanying note 4 *supra.*

theory of judicial review in the civilian cases should have application to the military. Approaches to review of civilian administrative actions suggest ways to improve the analysis in *Mindes*.

An agency is charged with making certain decisions. If the court makes the decisions instead, by substituting its judgment for that of the agency on review, it has usurped a function that properly belongs to the agency. Thus the judicial role is limited, and might be described generally as protecting individuals' rights vis-a-vis government by preventing certain executive and legislative actions. The judicial function, thus defined, is a negative one. From this flows the tradition of judicial restraint in second-guessing agency determinations.[39] Courts are understandably reluctant to become involved where the possible usurpation of functions is added to the normal judicial problem of justly balancing rights. And they are even more reluctant where the executive agency under review is an armed service.

Professor Kenneth Davis, in his text on adminstrative law, notes both the difficulty of the task and the tradition of judicial deference.[40] But he goes on to ask:

> [I]f the President and Congress [and by implication the military, an executive agency] are exceeding their constitutional power . . . might not the courts have the responsibility to decide no matter how difficult the constitutional question might be?[41]

In this vein, Davis reaches some general conclusions about "unreviewable" administrative actions that might be applied to the military as well:

> American experience concerning judicial review of administrative action seems strongly to support three fundamentals: (1) A limited judicial review does not weaken the administrative process but strengthens it. (2) Completely cutting off what the courts have to offer to a governmental program may violate the cardinal principle that functions should be allocated on the basis of comparative qualifications, for judges are specialists in constitutional issues, in statutory interpretation, in enforcing the limits of fair procedure, in assuring that findings are supported by substantial evidence, and in assuring that discretion has not been abused. (3) An independent check of administrative action is usually desirable for the same reason that an appellate court's check upon a trial court is desirable.[42]

When applied to the service, however, this viewpoint is at war with

39. For a provocative argument on the proper standard for review of agency rulemaking, *see* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L.R. 375, 385-95 (1974). And *see generally* DAVIS, *supra* note 8.

40. DAVIS, *supra* note 8, at 523.

41. *Id.* at 516.

42. *Id.* at 524.

the traditional notion that military expertise and discretion militate against judicial intervention. How are courts to respond to such assertions? Can courts accord them their just due and at the same time discharge their own constitutional function as guardians of individual rights? The balance can be struck, but as Davis remarks, "[i]ngenuity is needed to find ways to induce the judges to avoid an undue restriction of the area of reviewability."[43]

1. Expertise and Discretion

One helpful step is careful definition of terms. For example, if the service claims *expertise* it suggests that its decision was a *logical* one.[44] The court can then ask exactly what rational choice was made and whether and how the service has expertise with respect to that choice. But if the service claims *discretion*, it may present a different problem. Discretion under one definition implies the power to choose arbitrarily among alternatives none of which is rationally preferable over the others.[45] A broader definition also includes the power to make rational administrative decisions on a specified range of issues—in effect, to use judgment and make binding determinations. The latter is probably the definition most often appropriate in the cases.

If an exercise of discretion is indeed the power to make essentially nonrational choices, courts really cannot reexamine the choosing.[46] But if the discretion involved is merely the power to make rational judgments and choices administratively, then the decision-making process can be judicially reviewed without usurpation of executive functions. Under this approach exercise of discretion is effectively the same thing as *application* of expertise, so that whichever label is applied the analysis proceeds from the same principle: the court looks at a rational decision process and decides whether it has conformed to certain criteria of propriety.

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43. *Id.* at 516.

44. The service may draw on experience (and thus information) that is not within the courts' experience, but its decision must still rest on rational assessment of the question before it in light of that experience.

45. *See generally* Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 YALE L.J. 1205 (1970). It is this sort of authority the district court thought it was dealing with in Yahr v. Resor, 339 F. Supp. 964, 967 (E.D.N.C. 1972), and which the Supreme Court indicated in Orloff v. Willoughby, 345 U.S. 83 (1953), the services enjoy with respect to assignment decisions (at least against habeas corpus attack).

46. Where an otherwise apparently nonrational process produces a blatantly discriminatory impact (particularly a racial one) it may be struck down solely on that ground since the discriminatory impact suggests the presence of sub rosa illicit motivation. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

2. Review Criteria in Administrative Law

What are the criteria of propriety in administrative determinations? They vary. The court's role is negative—to check agency acts that trench too much upon protected rights. A respected federal judge has suggested the following test in a deportation case where discretion amounted to rational decision-making authority:

> [the action] would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to make relevant."[47]

In another case the principle was stated in briefer form: the person affected by a determination has the judicially enforceable right "to demand that the Secretary exercise his discretionary authority in a manner consistent with the requirements of the Act and not arbitrarily or capriciously."[48]

In fact, the standard in each case may vary according to the right at stake[49] and the type of agency action involved.[50] In no case, however, will it amount to substitution of judicial for agency judgment. In the case of agency rulemaking, in review under the Administrative Procedure Act a court may merely require that the agency have honestly considered all major factors, laying the burden on the agency to satisfy the court of that much, but not inquiring into the substantive weighing process and the merits of the rule.[51] But when the agency has "adjudicated" a particular individual's case, the court will be more intrusive,

47. Wong Wing Hang v. Immigration and Naturalization Serv., 360 F.2d 715, 719 (2d Cir. 1966). Applying the enunciated standard, the court upheld the agency action and Wong's consequent deportation.

48. DeVito v. Schultz, 300 F. Supp. 381, 383 (D.D.C. 1969). This case involved a determination by the secretary of labor not to initiate a court proceeding in response to a labor complaint under Title IV of the Labor Management Reporting and Disclosure Act (29 U.S.C. §§ 481-83) (1959). The court found the secretary's stated reasons for not acting to be inadequate, and remanded for reconsideration to be followed by either action or an adequate explanation. *Id.* at 384.

49. The right to wear hair in a particular style and the right to free speech on political questions will be accorded quite different levels of protection. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Cohen v. California, 403 U.S. 15 (1971).

50. Judge Wright distinguishes agency adjudication from rulemaking as major types of action. Wright, *supra* note 39, at 381-84. At an extreme remove from both is a distinctively military action such as deciding which unit is to go into a battle. The first two types of action call for a different judicial approach or review—and the latter for no review at all. An alternative—rejected by Wright in the rulemaking context as inappropriate and inconsistent with Overton Park v. Volpe, 401 U.S. 402 (1971)—is imposition of strict *procedural* standards and no consideration of substance. *Id.* at 390-91.

51. Wright, *supra* note 39, at 391-92.

requiring a "clear and convincing" showing of proof to support the agency's finding.[52]

This distinction applies in an interesting way to the discharge for homosexuality problem. Since the current Air Force regulation in question allows discretionary waiver of discharge,[53] the court will inquire into the circumstances closely because it has before it an "adjudication" of an individual case. The service's action is in reality three actions: the board's determination that the individual is a homosexual, the board's recommendation that he be discharged, and the commander's decision to order the discharge.

In Matlovich's case his homosexuality is stipulated.[54] Such a determination, were the fact in dispute, would be subject to normal fairness standards for agency adjudications. The proper standard is that "clear and convincing evidence" must appear in the record. The two remaining actions involve four possible discretionary choices: the board's recommendation that he be discharged; its fixing of the poorest type of discharge the commander may order;[55] the commander's decision whether or not to execute the discharge; and his determination whether or not to grant a better discharge than the board's recommendation.[56]

Once the fact of the man's homosexuality is established, these latter determinations are very similar in nature to those of the agency in *Wong Wing Hang*,[57] the immigration case cited above. Judge Friendly's three criteria (lack of rational explanation, inexplicable departure from the norm, and impermissible basis) apply as they did in *Wong*, where the decision was *not* to exercise the discretionary power to let the applicant remain in the United States.[58] Procedurally, the cases are exactly parallel, since the Air Force is making a discretionary decision not to exercise the power to let Matlovich remain in the service. The outcome, as it was in *Wong*, is clear: upon any rationally acceptable factual

52. *See id.* at 390-91; 5 U.S.C. § 706(2)(E) (1970).

53. AFM 39-12, Ch. 2, § H (Change 4, Oct. 21, 1970), together with Ch. 2, § B (Change 10, May 20, 1975), establishes a presumption that the individual should be discharged with an undesirable certificate where there are actual homosexual acts, but grants the board authority to recommend otherwise.

54. *See* N.Y. Times, Sept. 20, 1975, § 1, at 15, col. 4.

55. The discharge authority can order a discharge even when retention is recommended, but if he does so it must be an honorable discharge. He cannot, if the board recommends discharge, direct a discharge less favorable than that recommended. AFM 39-12, ch. 2, table 2-B-1, nn. 2, 3 (Change 10, May 20, 1975).

56. The commander has full discretionary authority in the "better" direction. *Id.*

57. Wong Wing Hang v. Immigration and Naturalization Serv., 360 F.2d 715 (2d Cir. 1966).

58. *Id.* at 716.

showing[59] that his continued presence endangers morale, the authority structure or, perhaps, public confidence, the court cannot find it "so wanting in rationality as to be an abuse of the discretion which Congress vested [in the service]."[60]

Of course, this covers only the argument on due process grounds. A discharged homosexual could raise equal protection arguments along with the ill-defined[61] but nonetheless powerful privacy right against the service's action. Such assertions ought to be subjected to a similar analysis, defining the interests and balancing them according to their importance, and might result in application of a stiffer test to the governmental action.

Suppose alternatively the service's regulation simply required discharge of homosexuals without provision for discretionary retention. This would bring into play the only review criteria applicable to rulemaking, namely that the court be satisfied the service has fairly considered all the factors[62] —including the importance to the individual of the sexual preference right. Again, on due process grounds, we are at the same point reached in the prior analysis: the service prevails unless its actions can be termed an abuse of discretion. And again the equal protection and privacy arguments, advanced to escalate the level of required proof, will be raised and dealt with separately.

Judicial review of administrative rulemaking and adjudication in the military is complicated where the service's judgment is closely related to the combat function; for example, transfers into and out of a battle zone. These are matters without direct parallel in civilian agency action, but a rough analogy can be made to judicial deference to agency expertise generally. The closer the military action is to combat, the greater special knowledge can be attributed to the service and the less proper is judicial intervention. The converse is also true: distance from combat speaks for judicial assertiveness and independence of judgment. This independence of judgment—the degree to which the court will actively balance the competing interests—must vary with the interests at stake. Therefore an explicit statement of those interests is in order.

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59. The standard has been stated as "clear error of judgment" *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954), or "arbitrary, fanciful or unreasonable . . . no reasonable man would take the view," Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942). As Judge Friendly remarks in *Wong*, "[a] narrower meaning seems more appropriate when a court is reviewing the exercise of discretion by an administrative agency or an executive officer . . . particularly so when the relevant statute expressly confides 'discretion' to the agency or officer . . . ." 360 F.2d at 718-19.

60. 360 F.2d at 719.

61. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965), and the numerous points of view embodied in that decision.

62. Wright, *supra* note 39, at 381-84.

II. The Mindes Criteria Revisited—Private Right, Private Harm and Military Interest

A. Private Right, Private Harm

Mindes lists as its first two criteria the nature and strength of plaintiff's interest, and the potential damage to him if relief is not forthcoming. An overview of administrative actions that may threaten legally cognizable rights, and thus of the manner in which the threat arises, is useful. Administration of the military services involves a variety of personnel actions, from discharge, or refusal to discharge, to transfers or duty changes, that may involve rights of individuals. The range of these possibilities is presented here in outline form for the sake of space. They are set forth roughly in order of their severity or potential impact on the individual, but the intent at this point is to simply lay out rather than evalute the various items on the list. They may be grouped under a few subheadings, as follows:

Figure I

Types of Administrative Actions

I. Administrative Discharge
   - A. The fact of discharge
   - B. The type of discharge

II. Refusals to Discharge
   - A. Conscientious objector
   - B. Other

III. Career Questions
   - A. Nonpromotion
   - B. Nonrecommendation for promotion, for reenlistment or retention
   - C. Unfavorable comments and evaluations (or insufficiently favorable ones) on effectiveness and performance reports
   - D. Written reprimands and admonitions

IV. Status Actions
   - A. Security clearance investigation: refusal, withdrawal, downgrading, or refusal to upgrade
   - B. Refusal (non-offer) of regular or career reserve status
   - C. Flying (or other specialized) status modification or withdrawal

V. Duty Actions
   - A. Transfers or refusals to transfer: component, base, or unit (including activation orders)

B. Duty assignment or change of position; assignment of details; imposition of "extra training"

VI. Other Pressures

A. Nonapproval or extended review of requests for permissions, meetings, events, publications, distributions, solicitations

B. Strict or selective enforcement or construction of directives

C. Inspections (including disguised searches)

D. Briefings, lectures, reprimands, admonitions

VII. Monetary Questions

A. Pay and dependency determinations

B. Financial liability to the government

This listing of actions is complete only in the sense that it presents the general types that may be encountered. The impact of these actions may involve immediate or prospective pecuniary damage,[63] or interfere with liberties not easily quantifiable by dollar amount.[64] Such action may merely affect one's status within the military,[65] may likely have impact outside the service, or may involve damage not easily classified within either of these categories. The court will also need to know why the action was taken,[66] what constitutional or other objection is asserted against it,[67] and whether procedural niceties were observed.[68]

63. Nonpromotion, or adverse pay or government property loss determinations, will affect finances immediately; an administrative discharge, particularly one carrying an other than honorable legend, may be severely damaging far into the future as well. *See* Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33 (1973); Ervin, *Military Administrative Discharges: Due Process in the Doldrums*, 10 SAN DIEGO L.R. 9 (1972).

64. An obvious example is freedom of speech.

65. Nonpromotion, nonselection to career status, etc., are examples.

66. Because the court is to decide if the determination is rationally (or perhaps more closely) related to the purpose of the determining agency, it needs to know what that purpose is.

67. Most rights will demand at least "rationality" to justify their infringement even in the military context. Others, for instance First Amendment liberties, or certain equal protection claims (race, alienage, and perhaps sex) may call for the higher "compelling" standard or—in the military context—some judicially created middle ground. The distinction is critical, as exemplified in Schlesinger v. Ballard, 419 U.S. 498 (1975). There Justice Stewart, for the majority, subjected a gender-based difference in the tenure allowable under "up-or-out" statutes to a mere rationality test and found the distinction to be based on real differences in opportunity enjoyed by the sexes. 419 U.S. at 508-09. He distinguished Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971), which had held that gender-based classifications imposed solely for administrative convenience violate equal protection. His analysis rested on a finding that a rational purpose (evening up of opportunities) existed apart from administrative convenience. 419 U.S. at 510. It might also be concluded that the Court reached this result because it had before it an instance of discrimination against men rather than women.

In the *Matlovich* case the action in question is an involuntary discharge. Only the fact of discharge and not its character is in issue in this case—[69] but the manual governing enlisted administrative discharges establishes a presumption that the discharge certificate should be "undesirable," so that in most cases the character of discharge would be a matter of concern as well.[70]

The impact of the action has already been touched upon. As far as we know the man was committed to a military career. That possibility is now foreclosed. The career-foreclosure is itself a deprivation; along with it go income both present and future as well as the possibility of military retirement. Less easily quantifiable, but certainly no less important, are privacy and associational rights protected by the Constitution. The service's regulation forces Matlovich to choose between exercising those rights and continuing his career. The regulation and the decision against discretionary waiver in his particular case may deny him equal protection as well.[71]

B. Military Interest

The discussion above has covered the first two points of the test in *Mindes*, defining the individual's position. Judge Clark's third point is an assessment of the "type and degree of anticipated interference with the military function." He explains:

> Interference per se is insufficient [to justify abstention] since there will always be some interference when review is granted, but if the

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Justice Brennan, joined in dissent by Justices Douglas and Marshall, stated his belief that gender-based classifications require "close judicial scrutiny" and the "compelling" test, 419 U.S. at 511, and found that the classification in this case failed both tests. *Id.* at 512, 517-18.

68. Where procedures are established by regulation or law, they must be observed or due process is violated. *See* Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975); Cortright v. Resor, 325 F. Supp. 797, 826 (E.D.N.Y. 1971), and cases cited therein.

69. The commander to whom the board reported decided to order an honorable rather than the general discharge which the board had recommended.

70. AFM 39-12, Ch. 2, § H, para. 2-104b. (Change 4, Oct. 21, 1970) requires use of Ch. 2, § B to process homosexuals' discharges where actual acts are involved. Sec. B in turn establishes a presumption that an undesirable discharge is appropriate, but allows better discharges where there is reason for granting them.

71. In outline, the equal protection argument would take homosexuals and heterosexuals as classes (and would point out the difficulty of defining these classes with precision), and argue that there is no rational reason why all homosexuals, or why the individual in a particular case, must be discharged. Beyond this, there would be an argument following Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971), and the dissent in Schlesinger v. Ballard, 419 U.S. 498 (1975), that sexual preference deserves the same expanded protection accorded race and alienage, or at least the more stringent protection afforded gender in *Reed*.

> interference would be such as to *seriously* impede the military in the performance of *vital* duties, it militates strongly against relief.[72]

To ask the seriousness of interference, however, is to ask first the threshold question: *what is the military function*? Only after it is defined can its importance be assessed and the degree of possible impediment created by review be examined. Without this, the third part of the *Mindes* test is either an unreasonably stiff standard[73] or an incantation which could mask virtually complete abdication of the review function.[74]

1. Valid Interests

The military shares many interests with civilian agencies: efficiency, a degree of discipline necessary to maintain that efficiency, administrative convenience and morale-getting assigned tasks done with minimum cost and maximum speed and effectiveness.[75] Shared also is an implicit interest in the appearance of fairness and good sense that underlies morale and, through it, effectiveness.

Unlike other administrative agencies, the military services are also supposed to be *fighting* forces.[76] This distinguishing characteristic of the military gives rise to additional interests whose recognition underlies the judicial tradition of noninterference. Identification of at least the most important interests is possible, as is acknowledgement that each justifies certain kinds of restrictions on what would otherwise be clear-cut legally cognizable rights.

The first and most obvious of these singularly military interests is

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72. 453 F.2d at 201 (emphasis added).

73. A court would feel free to act so long as it did not "*seriously* interfere with *vital* duties"—a quite intrusive standard.

74. A court so inclined could easily find this elastic wording loose enough to encompass practically all service actions. The parallel to clear and present danger as a standard is obvious. *See* Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). *See generally* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41 (1969).

The most reasonable position—and the one intended by the court, though by no means the one all courts would be expected to extract from Judge Clark's words—is that this phrase should be read literally, as a statement of when the court *should not inquire at all.* When an act of reviewing *would* seriously impede vital duties in certain instances, review in those instances is not proper. But absent that showing, a less absolute, balancing approach is called for.

75. *Cf.* Arnett v. Kennedy, 416 U.S. 134, 168 (1974).

76. Schlesinger v. Ballard, 419 U.S. 498, 510 (1975), *quoting* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955): "[I]t is the primary business of armies and navies to fight or be ready to fight . . . ." *See also* Orloff v. Willoughby, 345 U.S. 83, 94 (1953); United States v. Priest, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

the need for a peculiar type of discipline.[77] *Military* discipline is a *habit and pattern of obedience, required in combat* but *nurtured largely outside combat.* The extent to which this pattern must be maintained in noncombat situations is problematical, but combat and disciplinary needs arising from it are the most important characteristics distinguishing the military from other organizations. Therefore, the services' own judgments about the requirement for maintaining combat-type discipline outside combat are properly accorded weight by courts, consistent with the general principle of judicial deference to administrative expertise. Accordingly, the closer the decision is to actual combat, the greater the propriety of deference.[78]

However, the decision to use certain devices outside combat to produce the combat-required obedience pattern is a rational determination and therefore subject to judicial oversight. When radical changes in society, in the relative size of the military establishment, and in the composition of the forces themselves are taken into account,[79] it seems appropriate for courts to reexamine traditional discipline-creating practices to see if there is evidence that they still tend to produce that discipline.

There are other interests related to discipline which are common to civilian organizations, but which may differ in the military context. Morale and the need for security are two of these. Their importance seems self-evident. But where a military determination detracting from individual rights is based on these interests, and the service seeks to impose greater restrictions than could be imposed on civilians, the increased restrictions should be related to some distinctly military need.

Another military interest related to discipline is maintenance of the authority structure and corollary rules regulating the conduct of those in positions of authority. The services preserve their rank structure in part by regulating such persons' conduct so that it does not undermine discipline.[80] A case currently in the federal courts puts in issue the permissible scope of such regulation.[81] In this case an officer, by circulating among enlisted men a petition challenging the Air Force's haircut policy, gave notice to the men that he disagreed with the policy. His disagreement might pose a greater threat to discipline than would similar conduct by an enlisted man, especially if the implication were

77. "An Army is not a deliberative body. . . . Its law is that of obedience." *In re* Grimley, 137 U.S. 147, 153 (1890). Obedience is the keynote.

78. See text following note 62 *supra.*

79. *Cf.* Parker v. Levy, 417 U.S. 733, 781-83 (1974) (Justice Stewart, dissenting).

80. *Cf. id.* at 744. General George Marshall addressed this question in a letter which then Representative Jacob Javits read into the Congressional Record in 1951. 97 Cong. Rec. A4977 (1951).

81. Glines v. Wade, 401 F. Supp. 127 (N.D. Cal. 1975).

present that the officer would not enforce the existing regulation. A different free speech standard may therefore be properly applied to him than to enlisted personnel.[82]

There are two further interests of the services that are not related to combat discipline as such. They are vital in the relationship that exists between the service and the civilian population it serves. The first is subordination of the military to civilian control, and the second is confidence of the population in the military, especially during wartime.

Subordination of the military is a fundamental principle in our scheme of government. It finds expression most visibly in an organizational structure that places civilians in formal control of all military activities: the service secretaries, secretary of defense, and the president. It also emerges in several of the articles of the Uniform Code of Military Justice.[83]

Civilian confidence in the military—home front morale—is necessary in time of war. It is also necessary to a degree in peacetime, although a healthy skepticism is also needed to produce armed forces in which the people can sensibly be confident during a conflict. Military judgments as to which service policies maintain civilian confidence are particularly susceptible to judicial review since civilian courts do have a sense for what civilians think, and can legitimately arrive at their own conclusions.

The governmental-military interests sketched above are legitimate ones, and insofar as they are validly applied are not simply the particularistic desires of a separate military establishment, but rather are vital interests of the society as a whole. The legitimate requirements of military discipline can and must impose restrictions on what are otherwise inviolable rights.

Returning to the homosexual discharge case, the next step in the court's analysis would be consideration of the military interests that may be involved. First is combat discipline. Homosexuality as such has nothing to do with combat discipline. Problems resulting from the reaction of others to the homosexual service member do arise and may affect morale, mutual respect and maintenance of the authority structure. But the fact of homosexuality has no necessary effect on the individual's *own* obedience reactions[84] and discipline. The matter is best dealt with under the morale and authority structure interests, discussed below,

82. Justice Blackmun's concurring opinion in Parker v. Levy, 417 U.S. 733, 762-65 (1974) overstates the difference, but some exists.

83. *See id.* at 751. Article 88 of the Uniform Code of Military Justice (UCMJ) prohibits officers from speaking contemptuously about the president and some other office holders. 10 U.S.C. § 888 (1956).

84. See note 77 *supra* and text accompanying.

rather than as a discipline question per se. With even greater dispatch, we can eliminate the interest in subordination to civilian control as irrelevant.

We can assume, however, that most of the population, and most servicemembers, are heterosexual and probably regard other preferences as at best odd and at worst criminal or sinful. Whatever the merits of gay liberation and the eventual outcome of the controversy, acceptance of gay servicemembers would certainly raise serious questions in the areas of morale, public confidence and authority-structure maintenance. These questions need answers, and the answers can be provided by the *Matlovich* and related cases if the courts and parties address the problem squarely rather than relying on shopworn authority.

The governmental interests can be outlined more fully, if not definitively: many people are hostile to and uncomfortable with homosexuality. Presence of homosexuals *could* threaten morale and civilian confidence, and be potentially disruptive. It might also threaten the authority structure if straight subordinates had contempt for, disliked, or were uncomfortable with, gay superiors. There are other untoward possibilities if the roles are reversed. However, the degree to which government ought to accede to the popular hostility to homosexuality needs to be addressed as well. Is the protection of internal morale and public confidence valid if based on questionable popular prejudices? On the other hand, the services may have some obligation to discourage homosexuality as an aberration from commonly held values.[85] But this is dangerous ground.

The final governmental interest is security, an interest long used to justify discharges of individuals who concealed their homosexuality until caught. The concern is that blackmail is possible where such a matter is concealed, and therefore that information known or available to a homosexual might be extracted by an enemy agent. The theory has merit where sexual preference is concealed, as it still is in the preponderance of cases. But it has no weight where, as with Leonard Matlovich, the preference is open and unconcealed.

2. *Nonlegitimate Interests*

Certain rationales for administrative actions have recurred in the cases but do not legitimately justify violation of individual rights. The most obvious of these is the personal or vindictive motive of the deci-

85. The tone and content of Justice Blackmun's concurrence in Parker v. Levy, 417 U.S. 733, 762-65 (1974), joined in by Chief Justice Burger, indicates that at least some members of the Supreme Court consider enforcement of the common morality a proper function of the judiciary.

sion-maker. Courts should be aware of this possibility when assessing apparently valid administrative choices. In many circumstances, in fact, assertions of vindictiveness are singularly appropriate as issues to be raised by a plaintiff after the service has made a case on the basis of one of the valid justifications discussed above. Such questions will always be ones of fact *approachable through normal judicial methods.*[86]

Another illegitimate purpose, but one difficult to distinguish in concrete cases from the legitimate interest in discipline, is the perpetuation of tradition. Inertia is not manifest solely in physics. Particular traditional practices assertedly necessary to the maintenance of discipline ought to be subjected to at least some scrutiny upon a showing that they deprive individuals of protected rights. Courts need to decide, as they have done in some instances,[87] whether such a traditional practice does in fact serve the asserted end. Naturally the factual determination in a particular case will be difficult, as it will be in the *Matlovich* situation. But it should nevertheless be possible to rationally assess the competing arguments.

Perhaps the most dangerous illegitimate purpose is the use of administrative rules and decisions to effect a separatism between military personnel and civilians. Those familiar with service life will second the notion that a distinct emphasis on separateness exists. Certain service practices may put pressure on individuals to partake in a "total institution" holding values which are different from those of the rest of the nation and have no defensible purpose.[88]

Of course, certain military values may be different from common civilian ones,[89] but these are for the most part subsumed under the military-governmental interests explored above. Use of the service's coercive powers to inculcate other values is ultra vires, and should be checked by the courts.

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86. There is of course serious question as to when and to what degree courts ought to inquire into the motives of co-equal bodies. *Compare* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) *with* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. CT. REV. 95 (1971). Many of the reasons for reluctance are absent where the decision or act is that of an individual. This would cover the bulk of the determinations in question here.

87. A good example is the overturning of "mandatory worship" at the Air Force Academy in Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

88. Justice Douglas alludes to this concept of homogeneity in his dissent in Parker v. Levy, 417 U.S. 733, 770 (1974). *See* Comment, *Military Discipline and Political Expression: A New Look at an Old Bugbear*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 525, 532 (1971).

89. Obedience, which distinguishes military from civilian discipline, is one such value.

III. The Process of Review—Jurisdiction, Discretion and Balancing

A. Jurisdiction

It might seem self-evident that where constitional rights are at stake courts will have jurisdiction to hear the issues. But there is a pervasive split of authority as to whether any of the available statutes confer jurisdiction to review military administrative determinations.[90]

The Supreme Court in a leading case in the field[91] held that habeas corpus, while a proper tool to review the propriety of an individual's subjection to military control, could not be used to examine an assignment decision. By a similar process of reasoning, no internal decision of a service would be subject to review on habeas corpus.[92] The other possible bases for jurisdiction are the mandamus[93] and federal question[94] statutes, and the Administrative Procedure Act (APA) sections providing for judicial review.[95]

The no-jurisdiction school is typified by the district court opinion on remand in *Yahr v. Resor*.[96] After the circuit court had remanded for the lower tribunal to consider the merits of plaintiffs' claim that the local commander's refusal of permission to distribute an "underground" newspaper was unconstitutional, there was no hearing on the merits. Ignoring the Fourth Circuit's clear suggestion that it should review, the district court, in this case involving very important First Amendment political publication rights, narrowly construed its authority under both the APA and the federal question statute. It held, following a District of Columbia appellate decision, that:

> the action of the defendants involves a decision of a Commanding General concerning the maintenance of loyalty, discipline, and morale among Army troops under his command. Such action clearly

90. Aside from the district court in Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972), some courts have recently refused to acknowledge jurisdiction: Bramblett v. Desobry, 490 F.2d 405 (6th Cir. 1974); McGee v. Schlesinger, 378 F. Supp. 318 (W.D. Tex. 1974). But others have found jurisdiction in similar factual situations: Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972); Etheridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973); Klinkhammer v. Richardson, 359 F. Supp. 67 (D. Minn. 1973); as well as Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

91. Orloff v. Willoughby, 345 U.S. 83 (1953).

92. Because the extraordinary writ is available only to question the propriety of continued subjection to military control, once that propriety is established further inquiry on the basis of habeas corpus is foreclosed. *See* Orloff v. Willoughby, 345 U.S. 83 (1953).

93. 28 U.S.C. § 1361.

94. 28 U.S.C. § 1331.

95. 5 U.S.C. §§ 701-06 provides for judicial review of administrative agency decisions.

96. 339 F. Supp. 964 (E.D.N.C. 1972).

involves a question of national security and such questions are precluded from judicial review under the Administrative Procedure Act.[97]

The court thus refused to acknowledge jurisdiction under the APA, against the contrary implication by its own circuit court in the same case, in what is submitted was a clear misreading of the statute in question.[98] The court then noted that plaintiffs had offered no proof of dollar loss, and taking a myopic view of the First Amendment rights at stake held that they were not intrinsically valuable enough to meet the ten thousand dollar minimum required for federal question jurisdiction.[99]

Mandamus actions have received similarly short shrift from some courts. The quintessential holding is that mandamus does not lie to review discretionary decisions, however palpable the constitutional deprivation. Some courts have taken a less absolute stance, holding that discretion must be exercised within bounds set by notions of fair play and due process.[100] In short, an exercise of discretion cannot be arbitrary or capricious. This seems the better view. Decision-makers cannot be required to reach any particular decision, but they can, and must, be required to reach their eventual decision justly. This position is consistent with an understanding of the decision-making process as a rational choice of alternatives, rather than as a nonrational choice among logically indistinguishable options. The latter position, as pointed out above,[101] is proper only where the options truly are not subject to logical differentiation—an unusual circumstance.

A number of cases concerning military reservists' hair and appearance have dealt with the jurisdiction question, and the courts hearing them have predictably disagreed. In *Garmon v. Warner*,[102] a 1973 decision striking down the Marine Corps Reserve's ban on short-hair wigs worn to hide longer hair, the judge explored the federal question statute and the Administrative Procedure Act provisions, as well as mandamus, and found that all fairly applied to the case before him.

Regarding the federal question statute, he noted that the threatened action, callup to active duty for noncompliance, would easily produce $10,000 in individual damages.[103] The defense asserted that the APA

97. *Id.* at 967. The court cited Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969).

98. 5 U.S.C. §§ 551, 701 exclude from scrutiny military authority exercised in the field or occupied territory in wartime—no more.

99. 339 F. Supp. at 968-69. Admittedly, that position is probably in accord with the majority view.

100. *See, e.g.*, United States v. Flower, 452 F.2d 80, 86 (5th Cir. 1971), *rev'd on other grounds*, 407 U.S. 197 (1972).

101. See notes 44-46 *supra* and text accompanying.

102. 358 F. Supp. 206 (W.D.N.C. 1973).

103. *Id.* at 208.

provision could not independently confer jurisdiction, but he refused to conclude that Congress had intended another "unfortunate gap" in federal jurisdiction.[104] Finally, he characterized his proposed action on the issue of mandamus as one which required the defendant Marine officers to recognize plaintiffs' constitutional rights, rather than as one which would require defendants to perform any discretionary act.[105]

The *Garmon* decision followed a widely quoted case finding in favor of jurisdiction, *Friedman v. Froehlke*.[106] In *Friedman*, the First Circuit summarily dealt with an Air Force assertion that the courts cannot review regulations, and stated that defendants "confuse the issue of jurisdiction with the scope of review."[107] After noting the mandate of *Orloff*, the court reasoned:

> If *Orloff's* staking out of an exclusive military jurisdiction to determine "legitimate Army matters" is to have any other meaning than that the Army may determine any matter which it sees fit to determine, there must exist a minimal burden to bring the determination within the boundaries of legitimacy.[108]

This clearly raises one question that is begged by the contrary opinions—whether a determination *is* genuinely of a "legitimate Army matter" and, if so, whether the determination was arrived at in at least a minimally rational way. The positions taken in *Friedman, Garmon* and the other concurring cases are persuasive. Even under the strictures of *Orloff*, it seems proper for a civilian court to exercise its power to protect servicemembers' constitutional rights, and to subject military decisions to review at some level commensurate with the peculiar position of the military services.

B. Discretion and Balancing

The remaining *Mindes* criteria involve the degree to which certain questions may be left to military discretion, and the possible interference with military duties which judicial intervention might cause. But the degree of discretion of the service cannot be stated *a priori*. Rather, it is a function of the interests at stake, and of the relative knowledgeability of military authorities and the court.

The distinction drawn above between the nonrational and rational meanings of discretion[109] suggests that a court's first task will be to decide into which category the matter at issue fits. The criterion is simple: a decision is nonreviewable if and only if it is between choices

104. *Id.*
105. *Id.* at 209.
106. 470 F.2d 1351 (1st Cir. 1972).
107. *Id.* at 1352 n.1.
108. *Id.* at 1353.
109. See notes 44-46 *supra* and text accompanying.

that are not rationally differentiable. All other decisions are subject to judicial review.

Next, in a reviewable case, the court must define the nature and importance of the military interest:[110] any particular military expertise with respect to the subject matter; the opposing individual interests; and the court's own expertise about the matter at hand. The listing of administrative actions and the individual interests set forth earlier can help to define the individual's stake. Various general administrative and peculiarly military interests can give similar definition to the military side. Once the interests have been isolated, the court must assess the relative expertise of the miltiary decision-maker and the court with regard to the military interest and the way the administrative action furthers that interest. This protects the substance of military discretion without establishing it as a talisman.

The court's freedom in striking a balance between competing interests is circumscribed by the nature of those interests. The scope of review will be broad where the individual's interest is significant and that of the service weak. This is particularly true where the court has independent expertise about the military interest and the way it is served by the administrative action.[111] In such a case the burden of proof falls on the service to justify its administrative act. The burden of proof would be high. It might be framed in words from *Mindes*:[112] Only if judicial interference would seriously impede vital military functions, and if the action is clearly necessary to accomplishing the function, should the court refuse relief.

Conversely, where interests clearly weigh in favor of the service, and particularly where the court lacks expertise of its own, scope of review will be narrow and the burden reversed. An aggrieved individual must affirmatively show that the justification advanced by the service, or appearing in the history of the regulation, law, practice or act, has no rational basis or that an unacceptable motive lay at its base.

The court should of course require that some justification actually appear, and not act on the basis of its own imagination or suppositions.[113] On the basis of such justification for the military administra-

110. This includes possible congressional "commitment" of certain matters to the authority of the service. But such commitment is circumscribed by the constitutional limitations that protect individual rights. Congress cannot infringe individual rights indirectly (by conferring a right to do so on the military services) to any greater degree than it can directly.

111. The best example is the service's and the court's processes of evaluating how a given practice or decision may affect civilian attitudes toward the service.

112. *See* 453 F.2d at 201.

113. The majority's use of "equalization" theory in Schlesinger v. Ballard, 419 U.S. 498 (1975), is suspect under this principle, as the dissenters point out.

tive decision, a plaintiff would be required to negate each justification, carrying the burden of proving that each was irrational. In some instances it may be appropriate for the court, having initially assessed the quality of interests on both sides, simply to refuse further review, where the act of review would itself be detrimental to important military interests.[114]

In most cases presented to a court, however, neither party's interests will be paramount. Here a reasoned outcome can be reached by applying a balancing process. The court should first consider the type of administrative action involved and the nature of the individual rights which it threatens, as well as the importance of those rights and the degree of harm which will be suffered if relief is not granted. The court should similarly consider which military interest it is that requires the service to take the action in question. This includes examination of how the action serves the state interest.

The court's judgment about the individual and service interests should be supported by evidence and information before the tribunal. In most cases, substantial evidence seems appropriate as a test. Deference should be accorded a military determination which is supported by evidence not effectively countered by the individual. Such a test would minimally burden the service, yet leave room for disproof of supposed facts where they are not, or have ceased to be, true.

Throughout the process the court should adopt an independence of judgment consistent with its own expertise in the crucial matters: the importance of the interests, the degree of potential harm on each side, the logical connection between administrative action and military interest, and particularly the persuasiveness of evidence relating to that connection. Where the court's own expertise is considerable, as it is for example in weighing the effect on civilian attitudes of certain practices, it is appropriate for the court to be intrusive; the converse is true where the matter relates closely to the combat role and combat discipline.

Conclusion

This scheme for judicial review of military administrative decisions leans heavily on a threshold characterization and valuation of the interests involved. It also relies on traditional judicial tools for determining the allocation of burden of proof and degree of proof required. If it is workable, it should lead to a reasoned conclusion in the *Matlovich* case and others.

Certain of the discharged homosexual's interests are the same as those of plaintiff in *Mindes*: the questions of taking without due process

114. *E.g.*, an injunction barring the Navy from sending a ship into a combat area.

of financial rights and expectations. In addition, the homosexual advances privacy, associational and right-to-be-left-alone interests as deserving of the court's protection. These personal rights in particular are of great significance.

The governmental interests are also important. Morale and the authority structure are vital underpinnings of the desired end product, namely, discipline in combat. The civilian community's view of the services must also be accorded weight. While the military can lead public opinion to a degree, as it did with racial integration, it cannot divorce itself entirely from contemporary standards. Military standards must avoid extremes, both reactionary and avant-garde.

The problem of homosexual service members is not one in which either party's interests visibly overpower the other's. Therefore, the positions need to be examined in detail. The interests on both sides have been defined in the preceding discussion, and the question comes down to one of factual proof.

Absent an evidentiary record it is perhaps futile to predict an outcome in the *Matlovich* case. It is reasonable to assume that the government will show successfully that blanket acceptance of homosexuals into the service would be intolerably disruptive of morale and the authority structure. The service might also show similar harm with respect to civilian attitudes toward the service, but here, of course, the court would adopt greater independence of judgment. On the other hand, Sergeant Matlovich might well prove to the court's satisfaction that, in his particular case, no such disruptions would occur, or that they would not be significant enough to overcome his substantial personal interests. The court could conclude on such showings that the regulation's direction to discharge homosexuals is valid, but that in application to *Matlovich*, and by extension in all other individual cases, it must be more flexibly construed to conform to individual situations. The services would then be required to make individual determinations, a reasonable requirement in light of the very significant constitutional rights at stake.

The critical point, however, is not the outcome in any particular case, which is dependent on the facts of that case, but the process by which that outcome is reached. Traditional judicial tools are as workable when a court is considering military administrative decisions and actions as they are in other areas. They should be used.